

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-215910 **DATE:** February 8, 1985
MATTER OF: Herblane Industries, Inc.

DIGEST:

1. Protest that a solicitation specification was a performance rather than a design requirement is timely even though it was not filed prior to the closing date for receipt of proposals. The basis of protest was not apparent from the solicitation and did not arise until the protester's proposal was rejected and the protester became aware that the agency interpreted the requirement differently than it did.
2. Where a solicitation paragraph entitled "Specific Performance Requirements" incorporates by reference requirements from another specification which are clearly design requirements, the protester's interpretation of the requirements as performance requirements is unreasonable. The mislabeling of the design requirements as performance requirements does not change their essential nature.
3. Protest against a solicitation requirement for dual piston ejector units for bomb racks is denied where the agency reasonably concluded that the protester's single piston equipment presented an unacceptable technical risk.

Herblane Industries, Inc., protests the Department of the Navy's rejection of its proposal as unacceptable under solicitation No. N62269-84-R-0244, the first step of a two-step formally advertised procurement. We deny the protest in part and dismiss it in part.

The solicitation sought proposals for furnishing two alternative lots of material for bomb racks on the F/A18 aircraft. Offerors could submit offers on either or both lots, but award was to be made for only one lot. Lot I was for the delivery of 21 prototype ejector units, with an option for a production quantity of 1,350 units. These units were to be manufactured in accordance with specification No. (30003) 1453AS400 (specification 400). Lot II was for the delivery of 7 prototype bomb rack units with an option for a production quantity of 450 units. These units were to be manufactured in accordance with specification No. (30003) 1453AS401 (specification 401).

The quantities under Lot I were three times larger than those under Lot II because it takes three ejector units to make a bomb rack unit. If Lot I was awarded, the Navy would assemble the ejector units into a bomb rack. If Lot II was awarded, no such assembly effort would be necessary.

Herblane submitted a proposal on Lot II only. The Navy rejected the proposal because it did not comply with several specification requirements. The Navy states that while some of these deficiencies were minor, Herblane's failure to comply with a requirement that each ejector unit be a "dual ejector piston device" made its proposal totally unacceptable.

Herblane admits that its ejector units are not dual ejector piston devices.^{1/} It argues, however, that the solicitation requirement was a performance requirement rather than a design requirement. Herblane contends that its ejector units perform the same function as dual piston ejector units, but do it better. Accordingly, the protester asserts that the Navy improperly rejected its proposal.

^{1/}The ejector units in Herblane's system are powered by a single piston. Herblane's system is the result of a development program it had previously independently undertaken to design a new concept for weapon release.

The requirement that the ejector units be dual ejector piston devices was contained in paragraph 4.4, "Specific EU Design Requirements," of specification 400, which covered Lot I. The same requirement was incorporated by reference into specification 401, which covered Lot II. Specifically, paragraph 3.5, "Specific Performance Requirements," of specification 401 provided:

"Specific performance requirements are provided for the component ejector units for carriage and release of stores. These ejector units shall be in accordance with specification [400] paragraph 4.4 through 4.4.7.10."

Herblane argues that since paragraph 3.5 of specification 401 refers to specific performance requirements, the requirement for a dual ejector piston device is a performance requirement for Lot II even though paragraph 4.4 of specification 400 (which sets out the actual ejector unit requirement) refers to specific design requirements, and is clearly a design requirement for Lot I.

The Navy contends that Herblane's protest is untimely because it concerns an apparent solicitation impropriety which had to be raised prior to the closing date for receipt of proposals. See 4 C.F.R. § 21.2(b)(1) (1984). Herblane did not protest until after it was notified that its proposal had been rejected.

We find that the protest is timely. Herblane did not learn the basis for its protest until its proposal was rejected and it became aware that the Navy interpreted the dual piston requirement differently than Herblane. See Conrac Corp., B-205562, Apr. 5, 1982, 82-1 CPD ¶ 309. Since Herblane's protest was filed within 10 working days after it learned this information, there is no merit to the Navy's position. See 4 C.F.R. § 21.2(b)(2).

We find Herblane's interpretation of the dual piston requirement contained in specification 401 to be unreasonable. Although paragraph 3.5 of the specification is entitled "Specific Performance Requirements," it clearly requires that the ejector units be in accordance with specification 400, paragraph 4.4 "Specific E.U. Design Requirements." Further, the requirement at paragraph 4.4

that the ejector unit "be a dual ejector piston device" is clearly a design requirement. The essential nature of the requirement is not changed by the fact that paragraph 3.5 was inappropriately labeled. See Werner-Herbison-Padgett, B-195956, Jan. 23, 1980, 80-1 CPD ¶ 66 at 4. Accordingly, we consider Herblane's position to be without merit.

Herblane also contends that any requirement that the ejector units be dual ejector piston devices is unreasonable. According to Herblane, this is an outmoded technology which is doomed to failure, as evidenced by deficiencies previously encountered in dual piston ejector units.

The Navy states that the issuance of this solicitation was prompted by its growing dissatisfaction with the BRU-33/A bomb rack units now being used on the F/A18 aircraft. This dissatisfaction was due to the high cost of the units, as well as increasing reliability problems. The agency therefore determined to secure a cheaper and more reliable replacement for the existing units as quickly as possible. Under these circumstances, it sought existing, proven state-of-the-art hardware rather than newly developed technology.

The Navy also states that Herblane's single piston approach represents a drastic deviation from existing bomb rack technology, and points out that Herblane acknowledges this fact. The agency raises a number of questions about the acceptability of the single piston technology, points out that it has never been flight tested and contends that it would entail a much greater risk than dual piston technology. The Navy concludes that the single piston technology is a good candidate for further study and may prove to be a fine idea someday, but that for this procurement, given the agency's needs, single piston technology is totally unacceptable.

A protester who objects to the requirements in a solicitation bears a heavy burden since the contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements which reflect those needs. Duroyd Manufacturing Co., B-213046, Dec. 27, 1983, 84-1 CPD ¶ 28. It is the contracting agency which is most familiar with the conditions under which the supplies or services have been or will be used, and our

standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, we will not question agencies' decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Romar Consultants, Inc., B-206489, Oct. 15, 1982, 82-2 CPD ¶ 339.

Herblane has not demonstrated that the dual piston requirement is unreasonable here. As the agency points out, Herblane itself characterizes its single piston technology as "a new concept for weapon release" and "a complete departure from the standard bomb rack presently used by the military." Further, although Herblane states that its equipment has been successfully tested under laboratory conditions, it does not deny that the equipment has never been flight tested. While Herblane is correct that problems with dual piston technology have occurred in the past, it has not demonstrated that dual piston technology is inherently deficient. Nor has it provided an adequate basis for questioning the Navy's conclusion that single piston technology presents significantly greater risks than those associated with dual piston technology.

In that connection, we have recognized that the reduction of technical risk is a legitimate basis for a restrictive solicitation requirement. Eastern Marine, Inc., B-213945, Mar. 23, 1984, 84-1 CPD ¶ 343. Despite Herblane's disagreement with the agency's assessment of the risks associated with its equipment, we think the Navy's concerns are justified under the circumstances present here. We therefore deny Herblane's protest of the dual piston requirement.

We note that in discussing its interpretation of the solicitation as establishing performance requirements rather than design requirements, Herblane states that it considered "these performance requirements . . . to be totally inadequate to accomplish the end requirements of [specification 401]." It then goes on to take specific exception to some of these requirements. We consider these allegations to be untimely since they are based on improprieties in the solicitation which were apparent to Herblane, but were not protested by the closing date set for receipt of proposals. See 4 C.F.R. § 21.2(b)(1) (1984).

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The protest is denied in part and dismissed in part.

for Seymour Gove
Comptroller General
of the United States